

ESTTA Tracking number: **ESTTA639997**

Filing date: **11/19/2014**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	92057058
Party	Defendant Island Food & Fun, Inc.
Correspondence Address	ELIZABETH T RUSSELL LAW OFFICE 6907 UNIVERSITY AVE # 227 MIDDLETON, WI 53562-2767 UNITED STATES beth@erklaw.com
Submission	Reply in Support of Motion
Filer's Name	Elizabeth T Russell
Filer's e-mail	beth@erklaw.com, brussell@supranet.net
Signature	/elizabeth russell/
Date	11/19/2014
Attachments	11192014 Island reply motion to reopen.pdf(15163 bytes )

Attorney Docket No.: 90656-001

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

Fifty-Six Hope Road Music Limited,  Petitioner,  v.  Island Food & Fun, Inc.,  Registrant.	Cancellation No.: 92057058  Registration No.: 3225517
--	---

Commissioner for Trademarks  
ATTN: Trademark Trial and Appeal Board  
P.O. Box 1451  
Alexandria, VA 22313-1451

**REGISTRANT’S REPLY TO PETITIONER’S OPPOSITION TO REGISTRANT’S  
MOTION TO REOPEN**

On October 18, 2014 Registrant moved to reopen and reset its response and objection deadlines for Petitioner’s First Set of Requests For Admission; Petitioner’s First Set of Requests for Production; and Petitioner’s First Set of Interrogatories (the “Discovery Requests”). On November 7, 2014 Petitioner filed a brief in response. Petitioner’s brief in response was unsupported by any evidence not already of record. Registrant submits the following arguments in reply, and asks the Board to grant Registrant’s motion to reopen.

## ARGUMENTS IN REPLY

1. Registrant repeats and realleges the arguments set forth in its memorandum in support of the instant motion.
2. Petitioner's opposition to the instant motion relies upon *Hewlett-Packard Co. v. Olympus Corp.*, 931 F2d 1551, 18 USPQ2d 1710 (Fed Cir 1991). Petitioner states in its brief: "*Hewlett-Packard* is instructive and should govern the Board's adjudication of Registrant's motion to reopen." (Pet. Brief in Opposition, p.5).
  - a. Petitioner neglects to disclose that, in 1997, the Board expressly abandoned *Hewlett-Packard* in light of the United States Supreme Court's opinion in *Pioneer Inv. Servs. v. Brunswick Assocs. Ltd. P'ship* (507 US 380, 113 S Ct 1489, 123 L Ed 2d 74 [1993]); see *Pumpkin Ltd. v. The Seed Corps*, 43 USPQ2d 1582 (TTAB 1997).
  - b. Petitioner's failure to disclose the Board's abandonment of *Hewlett-Packard* is misleading, and invites consideration on the question of professional misconduct.
3. Petitioner's arguments regarding prejudice are baseless and misleading.
  - a. It is absurd to suggest that Registrant would suggest a deadline for the delivery of discovery materials without acknowledging that the parties' other deadlines would need similarly to be extended.

- i. In her email of October 8 (Russell Decl., Ex S) counsel for Registrant acknowledged that the requested November 17 deadline would necessitate a consented motion for the extension of all other deadlines, and expressly asked Petitioner's counsel for consent to such a motion. Petitioner's suggestion that Registrant contemplated a response deadline without concomitant extensions is thus unfair and intentionally misleading.
  
- b. Petitioner's remaining arguments seem – incredibly – to be based upon the fact that Registrant chose to exercise its statutory right to seek summary judgment. Certainly, the legitimate exercise of such a right cannot serve as the basis for ascribing culpability for delay. This is especially so in the present matter, wherein, by virtue of Registrant's extensive and thoroughly prepared motion, two of Petitioner's three alleged bases for relief have now been dismissed.
  - i. On May 7, 2014 the Board entered an order of suspension pursuant to Trademark Rule 2.127(d). By Rule, this order tolled the time to respond to outstanding discovery requests and the time for making required disclosures (TBMP 528.03; TBMP 510.03). The resulting delay to proceeding was thus occasioned by the Board's order and proper adherence to the Trademark Rules.
  
  - ii. There is no basis in law or equity for Petitioner's position that Registrant should somehow be punished for legitimately exercising its right to seek

summary judgment. This is especially so, in light of the fact that Registrant had been advising Petitioner of its intent to seek summary judgment for nearly nine months prior to doing so. (Russell Decl., Ex C).

iii. The proper course of action is to reset the time for Petitioner's service of discovery responses. See, e.g., *Leeds Technologies Ltd v. Topaz Communications Ltd.*, Opposition No. 91123449, order of the Board dated July 9, 2002.

c. Petitioner submits no facts or evidence not already of record. Petitioner merely attempts to spin the facts in its favor, without regard to the equities or to the indisputable fact that Registrant has at all times acted diligently and in good faith.

THE MOTION SHOULD BE GRANTED

Respectfully submitted,

/elizabeth t russell/

Attorney for Island Food & Fun, Inc.

Dated: November 19, 2014

The above is my electronic signature, personally entered by me in accordance with the requirements of 37 C.F.R. §2.193(c)

Elizabeth T Russell  
6907 University Ave., #227  
Middleton, WI 53562  
Telephone: 608-826-5007

## **CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing REGISTRANT'S REPLY TO PETITIONER'S OPPOSITION TO REGISTRANT'S MOTION TO REOPEN was served on Petitioner by mailing a copy by First Class Mail, postage prepaid, to Petitioner's counsel at the following address on this 19<sup>th</sup> day of November, 2014:

Jill M. Pietrini and Paul Bost  
SHEPPARD MULLEN RICHTER & HAMPTON LLP  
1901 Avenue of the Stars, Suite 1600  
Los Angeles, CA 90067-6017

/elizabeth t russell/

The above is my electronic signature, personally entered by me in accordance with the requirements of 37 C.F.R. §2.193(c)

Elizabeth T Russell  
6907 University Ave., #227  
Middleton, WI 53562  
Telephone: 608-826-5007